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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/538,543	06/10/2005	Loren Lantz	M-1107	3681

54964 7590 03/09/2007  
TYCO HEALTHCARE - EDWARD S. JARMOLOWICZ  
15 HAMPSHIRE STREET  
MANSFIELD, MA 02048

EXAMINER
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TOWA, RENE T

ART UNIT	PAPER NUMBER
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3736

SHORTENED STATUTORY PERIOD OF RESPONSE	MAIL DATE	DELIVERY MODE
3 MONTHS	03/09/2007	PAPER

**Please find below and/or attached an Office communication concerning this application or proceeding.**

If NO period for reply is specified above, the maximum statutory period will apply and will expire 6 MONTHS from the mailing date of this communication.

## Office Action Summary

Application No.

10/538,543

Applicant(s)

LANTZ ET AL.

Examiner

Rene Towa

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-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

### Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

### Status

- 1) ☒ Responsive to communication(s) filed on 15 December 2006.
- 2a) ☒ This action is **FINAL**. 2b) ☐ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

### Disposition of Claims

- 4) ☒ Claim(s) 1-12 is/are pending in the application.
- 4a) Of the above claim(s) \_\_\_\_\_ is/are withdrawn from consideration.
- 5) ☐ Claim(s) \_\_\_\_\_ is/are allowed.
- 6) ☒ Claim(s) 1-12 is/are rejected.
- 7) ☐ Claim(s) \_\_\_\_\_ is/are objected to.
- 8) ☐ Claim(s) \_\_\_\_\_ are subject to restriction and/or election requirement.

### Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on \_\_\_\_\_ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.
- Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
- Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

### Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some \* c) ☐ None of:
- ☐ Certified copies of the priority documents have been received.
  - ☐ Certified copies of the priority documents have been received in Application No. \_\_\_\_\_.
  - ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

\* See the attached detailed Office action for a list of the certified copies not received.

### Attachment(s)

- |  |   |
|--|---|
| 1) <input type="checkbox"/> Notice of References Cited (PTO-892)                     | 4) <input type="checkbox"/> Interview Summary (PTO-413)           |
| 2) <input type="checkbox"/> Notice of Draftsperson's Patent Drawing Review (PTO-948) | Paper No(s)/Mail Date. _____                                      |
| 3) <input type="checkbox"/> Information Disclosure Statement(s) (PTO/SB/08)          | 5) <input type="checkbox"/> Notice of Informal Patent Application |
| Paper No(s)/Mail Date _____  | 6) <input type="checkbox"/> Other: _____                          |

### **DETAILED ACTION**

1. The Office action is responsive to an amendment filed December 15, 2006.

Claims 1-12 are pending. Claims 1 & 11 are amended. No new claim has been added.

Claims 13-20 are cancelled.

#### ***Specification***

2. The disclosure is objected to because of the following informalities:

At line 6 of page 1, at line 20 of pages 9 & 11, the disclosure makes reference to "PCT Application No. PCT/US03/\_\_\_\_," which should apparently read -- PCT Application No. PCT/US03/00256--.

At line 29 of page 10, "inner protuberances 54" should apparently read --inner protuberances 62-- as per line 23.

Appropriate correction is required.

#### ***Claim Objections***

3. Claim 12 is objected to because of the following informalities:

At line 2-3 of the claim, the limitations "fingers" and "longitudinal ribs" render the claim indefinite; for example, it is unclear from the alternative language used in claim 1 whether or not the thermometer comprises a single or a plurality of "fingers" and "longitudinal ribs."

Appropriate correction is required.

#### ***Claim Rejections - 35 USC § 103***

4. The text of those sections of Title 35, U.S. Code not included in this action can be found in a prior Office action.

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5. Claims 1-2, 4-12 are rejected under 35 U.S.C. 102(b) as anticipated by or, in the alternative, under 35 U.S.C. 103(a) as obvious over Sato (US Patent No. 3,738,173).

In regards to claim 1, Sato disclose(s) a tympanic thermometer comprising:

a heat sensing probe 11 defining a longitudinal axis and an outer surface extending from a distal end of the tympanic thermometer;

an ejection apparatus 13 including at least one finger 13c extending from the distal end of the tympanic thermometer and being capable of movement along the outer surface of the probe 11 toward a distal end of the probe 11; and

a probe cover 12 being mountable to the distal end of the tympanic thermometer, the probe cover 12 defining an inner surface configured to engage the outer surface of the probe 11, the probe cover 12 including at least one rib 12d radially projecting from the inner surface thereof, the longitudinal rib defining a proximal face to facilitate ejection of the probe cover 12,

wherein the at least one finger 13c is movable, to eject the probe cover 12, toward the distal end of the probe 11, along the outer surface of the probe 11 and within the probe cover 12, and further is in contact with the proximal face at the inner surface of the probe cover 12 until the probe cover 12 is released from the probe 11 (see figs. 4, 6 & 8-10; column 2/lines 30-48 & 51-57; column 3/lines 11-20; column 4/lines 45-56; column 5/lines 7-15; column 6/lines 34-38 & 55-64; column 7/lines 3-6, 30-38, 46-54 & 63-68).

*It is noted that, in ejecting the probe cover, one can push down on the end cap 25 so that the fingers 13c strike the shoulder 12d of the probe cover 12 and thereby push off the probe cover 12.*

In regards to claim 2, Sato disclose(s) a tympanic thermometer wherein the outer surface of the probe defines a groove 29, transversely oriented relative to the longitudinal axis, which is configured to receive a portion of the probe cover 12 for releasably retaining the probe cover 12 with the probe (see figs. 6 & 8; column 3/lines 11-20; column 5/lines 7-15; column 7/lines 3-6).

In regards to claim 5, Sato disclose(s) a tympanic thermometer wherein the at least one finger 13c includes a tapered finger tip defining a distal strike face 13a (see fig. 9).

In regards to claim 6, Sato disclose(s) a tympanic thermometer wherein the at least one finger 13c is movable between a retracted position (see fig. 9) and an extended position (see fig. 4).

In regards to claim 7, Sato disclose(s) a tympanic thermometer whereby the at least one finger 13c is biased to the extended position (see fig. 4; column 6/lines 55-64).

In regards to claim 8, Sato disclose(s) a tympanic thermometer whereby the at least one finger 13c is releasably fixable in a retracted position (see fig. 4; column 6/lines 55-64).

In regards to claim 9, Sato disclose(s) a tympanic thermometer wherein the at least one finger 13c is releasably fixable via a latch, whereby the latch includes a

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release button 15 that is engageable to release the at least one finger 13c from the retracted position (see fig. 9; column 7/lines 63-68).

In regards to claim 11, Sato disclose(s) a tympanic thermometer wherein the at least one longitudinal rib 12d has a transverse face having a substantially parallel orientation relative to the axis of the probe (see fig. 9).

In regards to claims 4 &10, Sato discloses a tympanic thermometer, as disclosed above, that teaches all the limitations of the claims except Sato does not teach a plurality of fingers or longitudinal ribs. However, it would have been obvious to one of ordinary skill in the art at the time Applicant's invention was made to provide a thermometer similar to that of Sato with a plurality of fingers and longitudinal ribs since such a modification would amount to a design choice. It has previously been held that duplicating part for a multiple effect is not patentable--See *In re Harza*, 274 F.2d 669, 671, 124 USPQ 378, 380 (CCPA 1960).

More in regard to claim 12, it would have been obvious to one of ordinary skill in the art at the time Applicant's invention was made to provide a thermometer similar to that of Sato, as modified above, with a plurality of equidistantly spaced fingers and/or longitudinal ribs since such a modification would amount to a design choice. It has previously been held that changing aesthetic design is not patentable--See *In re Seid*, 161 F.2d 229, 231, 73 USPQ 431, 433 (CCPA 1947).

More in regard to claim 1, although Sato does not explicitly disclose a thermometer comprising fingers for ejecting the probe cover, it would have been obvious to one of ordinary skill in the art at the time Applicant's invention was made to

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provide a thermometer similar to that of Sato with fingers for moving the probe cover since such a modification would amount to a design choice. It has previously been held that merely rearranging or reversing parts (i.e. moving the fingers to eject the probe cover versus moving the probe body to eject probe cover) is not patentable--see *In re Gazda*, 219 F. 2d 449, 452, 104 USPQ 400, 402 (CCPA 1955).

6. Claim 3 is rejected under 35 U.S.C. 103(a) as being unpatentable over Sato ('173) in view of Makita et al. (US Patent No. 5,340,215).

Sato discloses a thermometer, as disclosed above, that teaches all the limitations of the claim except Sato does not disclose a plurality of protuberances projecting from the inner surface of the probe cover.

However, Makita et al. disclose a thermometer wherein the portion of the probe cover 9 includes a protuberance projecting from the inner surface of the probe cover 9 and being proximally spaced from the distal end of the probe cover (see figs. 2 & 6; column 4/lines 53-54 & 59-61).

Since Sato teaches a retaining means for releasably retaining the probe cover, it would have been obvious to one of ordinary skill in the art at the time Applicant's invention was made to provide a thermometer similar to that of Sato with a protuberance similar to that of Makita et al. in order to releasably attach the probe cover to the probe. Moreover, it would have been obvious to one of ordinary skill in the art at the time Applicant's invention was made to provide a thermometer similar to that of Sato as modified by Makita et al. with a plurality of protuberances since such a modification would amount to a design choice. It has previously been held that duplicating part for a

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multiple effect is not patentable--See *In re Harza*, 274 F.2d 669, 671, 124 USPQ 378, 380 (CCPA 1960).

7. Claims 1-12 are rejected under 35 U.S.C. 103(a) as obvious over Sato ('173) in view of Makita et al. (US Patent No. 5,340,215).

In regards to claim 1, Sato disclose(s) a tympanic thermometer comprising:

a heat sensing probe 11 defining a longitudinal axis and an outer surface extending from a distal end of the tympanic thermometer;

an ejection apparatus 13 including at least one finger 13c extending from the distal end of the tympanic thermometer and being configured for movement along the outer surface of the probe 11 toward a distal end of the probe 11; and

a probe cover 12 being mountable to the distal end of the tympanic thermometer, the probe cover 12 defining an inner surface configured to engage the outer surface of the probe 11, the probe cover 12 including at least one longitudinal rib 12d radially projecting from the inner surface thereof, the longitudinal rib defining a proximal face to facilitate ejection of the probe cover 12,

wherein the at least one finger 13c is movable, to eject the probe cover 12, toward the distal end of the probe 11, along the outer surface of the probe 11 and within the probe cover 12, and further is in contact with the proximal face at the inner surface of the probe cover 12 until the probe cover 12 is released from the probe 11 (see figs. 4, 6 & 8-10; column 2/lines 30-48 & 51-57; column 3/lines 11-20; column 4/lines 45-56; column 5/lines 7-15; column 6/lines 34-38 & 55-64; column 7/lines 3-6, 30-38, 46-54 & 63-68).



*It is noted that, in ejecting the probe cover, one can push down on the end cap 25 so that the fingers 13c strike the shoulder 12d of the probe cover 12 and thereby push off the probe cover 12.*

In regards to claim 2, Sato disclose(s) a tympanic thermometer wherein the outer surface of the probe defines a groove 29, transversely oriented relative to the longitudinal axis, which is configured to receive a portion of the probe cover 12 for releasably retaining the probe cover 12 with the probe (see figs. 6 & 8; column 3/lines 11-20; column 5/lines 7-15; column 7/lines 3-6).

In regards to claim 5, Sato disclose(s) a tympanic thermometer wherein the at least one finger 13c includes a tapered finger tip defining a distal strike face 13a (see fig. 9).

In regards to claim 6, Sato disclose(s) a tympanic thermometer wherein the at least one finger 13c is movable between a retracted position (see fig. 9) and an extended position (see fig. 4).

In regards to claim 7, Sato disclose(s) a tympanic thermometer whereby the at least one finger 13c is biased to the extended position (see fig. 4; column 6/lines 55-64).

In regards to claim 8, Sato disclose(s) a tympanic thermometer whereby the at least one finger 13c is releasably fixable in a retracted position (see fig. 4; column 6/lines 55-64).

In regards to claim 9, Sato disclose(s) a tympanic thermometer wherein the at least one finger 13c is releasably fixable via a latch, whereby the latch includes a

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release button 15 that is engageable to release the at least one finger 13c from the retracted position (see fig. 9; column 7/lines 63-68).

In regards to claim 11, Sato disclose(s) a tympanic thermometer wherein the at least one longitudinal rib 12d has a transverse face having a substantially parallel orientation relative to the axis of the probe (see fig. 9).

In regards to claims 4 & 10, Sato discloses a tympanic thermometer, as disclosed above, that teaches all the limitations of the claims except Sato does not teach a plurality of fingers or longitudinal ribs. However, it would have been obvious to one of ordinary skill in the art at the time Applicant's invention was made to provide a thermometer similar to that of Sato with a plurality of fingers and longitudinal ribs since such a modification would amount to a design choice. It has previously been held that duplicating part for a multiple effect is not patentable--See *In re Harza*, 274 F.2d 669, 671, 124 USPQ 378, 380 (CCPA 1960).

More in regard to claim 12, it would have been obvious to one of ordinary skill in the art at the time Applicant's invention was made to provide a thermometer similar to that of Sato, as modified above, with a plurality of equidistantly spaced fingers and/or longitudinal ribs since such a modification would amount to a design choice. It has previously been held that changing aesthetic design is not patentable--See *In re Seid*, 161 F.2d 229, 231, 73 USPQ 431, 433 (CCPA 1947).

More in regard to claim 1, Sato discloses a thermometer, as disclosed above, that teaches all the limitations of the claim except Sato does not explicitly disclose fingers for ejecting the probe cover.

However, Makita et al. disclose a thermometer wherein the fingers 7 are movable to eject the probe cover 9 from the probe 4 (see figs. 4-6; column 5/lines 1-15).

It would have been obvious to one of ordinary skill in the art at the time Applicant's invention was made to provide a thermometer similar to that of Sato with fingers similar to that of Makita et al. in order to eject the probe cover from the probe (see column 5/lines 1-15).

More in regard to claim 3, Sato discloses a thermometer, as disclosed above, that teaches all the limitations of the claim except Sato does not disclose a plurality of protuberances projecting from the inner surface of the probe cover.

However, Makita et al. disclose a thermometer wherein the portion of the probe cover 9 includes a protuberance projecting from the inner surface of the probe cover 9 and being proximally spaced from the distal end of the probe cover (see figs. 2 & 6; column 4/lines 53-54 & 59-61).

Since Sato teaches a retaining means for releasably retaining the probe cover, it would have been obvious to one of ordinary skill in the art at the time Applicant's invention was made to provide a thermometer similar to that of Sato with a protuberance similar to that of Makita et al. in order to releasably attach the probe cover to the probe. Moreover, it would have been obvious to one of ordinary skill in the art at the time Applicant's invention was made to provide a thermometer similar to that of Sato as modified by Makita et al. with a plurality of protuberances since such a modification would amount to a design choice. It has previously been held that duplicating part for a

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multiple effect is not patentable--See *In re Harza*, 274 F.2d 669, 671, 124 USPQ 378, 380 (CCPA 1960).

### ***Response to Arguments***

Applicant's arguments filed December 15, 2006 have been fully considered but they are moot in view of the new grounds of rejection.

### ***Conclusion***

8. **THIS ACTION IS MADE FINAL.** Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

A shortened statutory period for reply to this final action is set to expire THREE MONTHS from the mailing date of this action. In the event a first reply is filed within TWO MONTHS of the mailing date of this final action and the advisory action is not mailed until after the end of the THREE-MONTH shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of the advisory action. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the mailing date of this final action.

9. Any inquiry concerning this communication or earlier communications from the examiner should be directed to Rene Towa whose telephone number is (571) 272-8758. The examiner can normally be reached on M-F, 8:00-16:30.

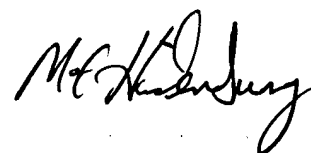
If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Max Hindenburg can be reached on (571) 272-4726. The fax phone

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number for the organization where this application or proceeding is assigned is 571-273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.

RTT

A handwritten signature in black ink, appearing to read "M. H. S. Jung", is located in the lower right quadrant of the page.